CRIMINAL YEAR SEMINAR

April 4, 2014 - Phoenix, Arizona
April 11, 2014 - Tucson, Arizona
April 25, 2014 - Mesa, Arizona

2014 CRIMINAL RULES UPDATE

Presented By:

JUDGE MICHAEL JONES
Maricopa County Superior Court
Phoenix, Arizona

Distributed By:

ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL
1951 W. Camelback Road, Suite 202
Phoenix, Arizona 85015

ELIZABETH ORTIZ
EXECUTIVE DIRECTOR

KIM MACEACHERN
STAFF ATTORNEY

And

CLE WEST
5130 N. Central Ave
Phoenix, AZ 85012

Criminal Rules 2014

Judge Michael D. Jones (Ret.)
Assistant Professor
Arizona Summit Law School
1 N. Central
Phoenix, Az. 85004
mjones@azsummitlaw.edu

Rule 4.1 (Time of Initial Appearance) and

Rule 6.1 (Right to Counsel)

***State v. Brown*, 233 Ariz. 153, 310 P.3d 29 (Ct. App. 2013).**

- Four armed, masked men entered an apartment and ordered the occupants to the floor. One of the occupants, J.J., was armed and he shot two of the masked men, killing one (White) and injuring another (Defendant Brown).
- Brown convicted of felony murder, multiple counts of att. Armed robbery and aggravated assault.
- Brown taken to the hospital where he later confessed to detectives from his hospital bed after being read his Miranda rights.

Holding

1. Timely Initial Appearance?
   - 24 hour presumptive time limit in Rule 4.1(a)
   - Brown was taken before magistrate for I/A within 24 hours after his release from the hospital
   - Necessity of Brown's medical treatment caused the delay– therefore it was excusable delay
   - But, in footnote 5, the Court notes that no argument was presented that the court could have conducted the I/s via an electronic, interactive audiovisual system, as authorized by Rule 1.6, Ariz. R. Crim. P.!!!!!!!!
2. Delayed attachment of Brown's right to consult with counsel -- Rule 6.1(a) argument that Brown would not have confessed if he had had counsel after a timely I/A. Rejected, because Brown waived his right to counsel.

Rule 6.1(b)
Right to change of appointed counsel

State v. Hernandez, 232 Ariz. 313, 305 P.3d 378 (2013)

- This is a capital case- Hernandez was sentenced to death for 3 murders
- Hernandez claims the trial judge (Duncan) erred by failing to sufficiently inquire into his 3 requests for change of counsel
- State v. Torres (2004) requires a hearing and that the judge inquire as to the basis for the defendant's request for new counsel.
- Hernandez claimed that defense counsel (Carter & Johnson) had only visited him at the jail 4 times in 2 years and had never discussed his case with him.

State v. Hernandez

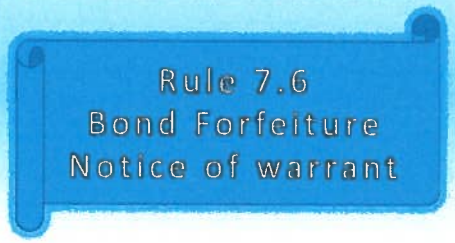
- However, record shows 2 mitigation status conferences where Hernandez told the judge that his attorneys were keeping him informed
- Defense counsel explained that Hernandez was frustrated with the defense regarding possible witnesses, but he would discuss with the defendant.
- Trial Judge found no breakdown in communication, and that the disagreement concerned trial strategy.

Holding: Hernandez

A trial judge should evaluate:

1. Whether new counsel would be confronted with the same conflict
2. Timing of the defendant's motion
3. Inconvenience to witnesses
4. Time already elapsed between the offense & trial
5. Proclivity of the defendant to change counsel
6. The quality of current counsel

Here complete record supports the trial judge's decision.



State v. Sun Surety Ins. Co., 232 Ariz. 79, 301 P.3d 583 (Ct. App. 2013)

- State appeals from a trial court's order exonerating a bond posted on behalf of Jason Parker.
- Parker was released ona $3,000.00 appearance bond.
- Parker failed to appear at a pretrial hearing and a warrant was issued for his arrest.
- Rule 7.6(c)(1) requires the court to notify the surety within 10 days of the issuance of the warrant– not done in this case by the court.

Sun Surety

- Sun Surety argues that because it was never notified, it never had the chance to return Parker to custody and avoid or mitigate forfeiture of the bond.
- Division 2 holds that Rule 7.6(d)(3) grants the court discretion to exonerate the bond and to consider all the relevant circumstances (including whether the surety was given notice)

Amendment to Rule 7.6(c)(1), effective 1/1/14

c. Forfeiture Procedure

(1) Notice and Hearing. If at any time it appears to the court that the released person has violated a condition of an appearance bond, it shall issuer a bench warrant for the person's arrest. Within 10 days after the issuance of the warrant, the court shall notify the surety, in writing or by electronic means, that the warrant was issued. As soon as practicable after issuance of the warrant, the court shall also set a hearing within a reasonable time not to exceed 120 days requiring the parties and any surety to show cause why the bond should not be forfeited....

Rule 9.1
Waiver of the right to be present

2 cases: *Fitzgerald* & *Rose*

State v. Fitzgerald, 232 Ariz. 208, 303 P.3d 519 (2013).

- Fitzgerald charged with capital offense. During penalty phase the defendant could not control himself during the victim impact statement. Tr. Judge (Duncan) found that defendant was unable to knowingly, intelligently waive his presence & ordered Rule 11 procedures.
- Judge suspended the penalty phase & later declared a mistrial.

Fitzgerald

- At 2nd penalty phase trial, Fitzgerald asked to waive his appearance and submitted an affidavit to the court acknowledging that he had been advised of his rights (& Judge personally addressed him).
- Fitzgerald claims this waiver was not voluntary because he was forced to waive presence to avoid a disruptive outburst– Supreme Ct. rejects this as Fitzgerald made the request to absent himself-- & he had been restored to competency after Rule 11 proceedings

Fitzgerald– Rule 11 issue

- Fitzgerald's statements to Correctional Health Services personnel during the Rule 11 proceedings were used by the prosecutor to rebut Fitzgerald's mental impairment mitigation evidence.
- Rule 11.7 provides for a 'privilege' preventing the defendant's statements made during Rule 11 proceedings from being used "at any proceeding to determine guilt or innocence"

Fitzgerald– Rule 11 issue

- Supreme Court holds that the penalty phase of a capital trial is not a proceeding to determine guilt or innocence
- More importantly, Fitzgerald placed his mental condition at issue by introducing evidence of mental impairment as mitigation

***State v. Rose*, 231 Ariz. 500, 297 P.3d 906 (2013).**

- Edward Rose sentenced to death for 2 counts murder
- Rose claims error in his absence from the courtroom during the initial portions of jury selection
- Trial court may rely on a waiver by counsel; a personal waiver by the defendant is not required.
- Defendant was absent the 1st day because of a medical quarantine in the jail
- Defendant did not object to his absence at any time.
- No error.

RULE 10
CHANGE OF VENUE

State v. Payne, 233 Ariz. 484, 314 P.3d 1239 (2013).

Issue is Rule 10.3(b) prejudicial pretrial publicity—

- Christopher Payne & his girlfriend starved & abused his two children (aged 3 and 4 years old) until they died. He was convicted and sentenced to death. Convictions & sentences affirmed in Chief Justice Berch opinion
- Payne offered over 200 newspaper & broadcast news reports about the case. They included Payne's criminal history & graphic descriptions of daughter's remains.
- However, most of the coverage occurred at least a year before the trial. Much of it was directed at criticism of CPS.

State v. Payne

Remember the test for prejudicial pretrial publicity is from State v. Bible, 175 Ariz. 549 (1993), a 2 part test:

(1) presumed prejudice because pretrial publicity permeated court proceedings or created a carnival-like atmosphere; or

(2) def must prove actual prejudice among the members of the jury. That is the effect of the pretrial publicity on the objectivity of the jurors actually chosen.

State v. Payne-- Holding

- Payne failed to meet heavy burden of showing presumed prejudice.
- 5 of 7 jurors who heard media reports heard only "very little" –all 7 assured judge they could disregard what they had heard or read.
- Throughout the trial the jury was admonished to avoid media coverage of the case.
- Payne claimed that judge's order to jury to remain on one floor of the courthouse proved actual prejudice; however, Supreme Court found it to be "precisely the type of prophylactic measures courts should take to avoid tainting the jury."

RULE 11.6(E) DISMISSAL OF THE CHARGES

***Rider v. Garcia*, 233 Ariz. 314, 312 P.3d 113 (Ct. App. 2012).**

Lamont Rider was indicted for murdering his cellmate. The Rule 11 court found Mendoza incompetent to stand trial, and ordered restoration to competency via a correctional health services program.

After Rider had received services for several months, the court found there was no substantial probability that Rider would regain competence within 21 months. The court remanded Rider to a mental health facility for commencement of civil commitment proceedings. And, dismissed the charges without prejudice.

Rider v. Garcia

When Rider was about to be release on a supervised release into the community, the state refiled the murder charge and had Rider arrested.

Rider applied for habeas corpus relief before the trial judge (Garcia) who denied all relief.

Rule 11.5(b)(2)(iii) requires all dismissals pursuant to this rule to be without prejudice, thereby implying that the charges may be refiled when the defendant regains competency. Here Rider's mental health had progressed to the point where he was eligible to be released from inpatient treatment.

Special Action relief is denied to Rider.

Amendment to Rule 12.9 Challenges to Grand Jury Proceedings, effective 1/1/14

New section (c) to provide for procedure and time limit for remand to the Grand Jury:

c. Relief. If a motion for a new finding of probable cause is granted under this rule, the State may proceed with the prosecution of the case pursuant to Rule 2, Rules of Criminal Procedure, or by resubmission to the same or another grand jury. Unless a complaint is filed or a grand jury consideration is commenced **within fifteen days after entry of the order granting the motion** under this rule, the case shall be dismissed without prejudice.

Rule 13.2(c) Necessarily included offenses

State v. Hines, 232 Ariz. 607, 307 P.3d 1034 (Ct. App. 2013).

- Hines was charged with a class 2 felony Promoting Prison Contraband, but convicted of the class 5 felony of the same name. The difference is that when the contraband is a deadly or dangerous weapon, the crime is a class 2 felony.
- Hines contends that because the legislature used the term "or" in listing various contraband that the crime is actually several different crimes.
- However, the plain language of the statute makes it clear that the statute provides one broad definition of contraband, and lists several examples – which is where the "or" language appears.
- Conviction is affirmed.

Rule 13 Joinder

"Duplicitous Indictment" vs. "Duplicitous charge" vs. "Multiplicitous charges"

And, who really cares...

Review

- **"Duplicitous Indictment"** is one that charges in one count ---several crimes;
- **"Duplicitous charge"** is one that alleges multiple crimes through the presentation of evidence at trial that the crime may have been committed by several different acts– different crimes, but one charge
- **"multiplicitous"** is an indictment that charges one crime in two counts. One of the two convictions violates Double Jeopardy.

State v. Valenti, 231 Ariz. 579, 299 P.3d 751 (Ct. App. 2013).

- Valenti convicted of Second Degree Murder– conviction is affirmed by Division 1
- Valenti claims a duplicitous indictment: the Grand Jury indicted him on one count of Second Degree Murder for causing the death of victim Jamie L. by (1) intentionally but without premeditation, (2) knowing that his conduct would cause death or serious physical injury, or (3) recklessly engaging in conduct that created a grave risk of death, manifesting extreme indifference to human life.

Valenti

- The jury was given a single verdict form which did not specify the mental state found.
- Statute prohibiting one act committed with different mental states are construed as defining a single offense.
- Ct concludes that the defendant is not entitled to a unanimous verdict as to the mental state– defendant is entitled only when the elements of an offense differ from that of another defined within a statute.
- Affirmed.

Joinder of offenses under Rule 13.3(a)(3) – Common Scheme or Plan

- ***State v. Miller*, ___Ariz. ___, 326 P.3d 1219 (2013).**
- Miller was convicted of 5 counts of First Degree Murder and sentenced to death on each count.
- Miller asked four men (separately) to carry out the murders that he ultimately committed himself.
- Each man testified that Miller wanted the victims dead because Steven and Tammy had cooperated with the police in their investigation of Miller for the arson and fraud related to a fire at his home.
- No abuse of discretion– clear common scheme/plan by Miller to kill the victims for a specific motive.

Rule 13.5(c) Chronis hearings

- ***Sanchez v. Ainley*, 233 Ariz. 14, 308 P.3d 1165 (Ct. App. 2013), *vacated* ___Ariz.___, *slip opinion filed 3/20/14.***
- Special Action by Defendant Sanchez charged with capital murder claiming trial judge erred in refusing to hold a Chronis hearing regarding aggravating circumstances alleged by the state.
- The trial judge and Court of Appeals found that the Grand Jury found probable cause for the aggravating circumstances alleged, when case was remanded for new finding of probable cause on Sanchez' motion (they found a true bill).
- **Review granted** by Arizona Supreme Court as a Grand Jury is not authorized by statute or rule to make a finding of probable cause on aggravating circumstances alleged to support a capital offense.

Discovery

Cleanup of Rule 15.8

Rule 15.8. Disclosure prior to expiration of a ~~plea deadline~~ offer; sanctions

a. ~~If the prosecution has imposed a plea deadline in~~ a case in which an indictment or information has been filed in Superior Court, ~~but does not~~ when extending a plea offer, the prosecutor must provide the defense with material disclosure listed in Rule 15.1(b) then within the prosecutor's possession. If the prosecutor has not previously made such disclosure, if the disclosure is made less than ~~at least~~ 30 days before the offer expires or is withdrawn, sanctions may be imposed under Rule 15.8(b), unless the prosecutor reasonably believes that an offer should be withdrawn because, in light of new information, it is contrary to the interests of justice. ~~prior to the plea deadline.~~ While a plea offer is pending, the prosecutor must continue to comply with Rule 15.6, but additional disclosures under that rule do not extend the 30-day period.

b. ~~the court, u~~Upon motion of the defendant, the court shall consider the impact of the prosecutor's failure ~~to provide such disclosure~~ comply with Rule 15.8(a) on the defendant's decision to accept or reject a plea offer. If the court determines that the prosecutor's failure to provide such disclosure materially impacted the defendant's decision and the prosecutor declines to reinstate the lapsed or withdrawn plea offer, then the presumptive minimum sanction shall be preclusion from admission at trial of any evidence not disclosed ~~at least 30 days prior to the deadline~~ as required by Rule 15.8(a). Disclosure of evidence, including the results of any scientific testing, after the offer expires or is withdrawn does not violate Rule 15.8(a) as long as the disclosure did not exist when the offer was extended.

Cleanup of Rule 15.8- what it means

When extending a plea offer, the prosecutor must provide the defense with material disclosure listed in Rule 15.1(b) then within the prosecutor's possession, if the prosecutor has not previously made such disclosure.

If the disclosure is made less than 30 days before the offer expires or is withdrawn, sanctions may be imposed under Rule 15.8(b), unless the prosecutor reasonably believes that an offer should be withdrawn because, in light of new information, it is contrary to the interests of justice .

While a plea offer is pending, the prosecutor must continue to comply with Rule 15.6, but additional disclosures under that rule do not extend the 30-day period.

State v. Benson, 232 Ariz. 452, 307 P.3d 19 (2012).

- Trent Benson was convicted of 2 counts of First Degree Murder– sentenced to death; and eight other felonies involving his crimes against 4 women.
- Defendant's DNA expert requested all partial match information from the DPS offender database to test whether the 'produce rule' accurately predicts the number of matches.
- State's expert testified that it would be inappropriate because the profiles were not random.
- Trial Judge (Brnovich) denied the request finding that expert's requested material was unsuitable for his stated purpose, his model was "novel", and there was other information available to inform his tests.
- Affirmed.

Disclosure by Defendant- Rule 15.2(g)

- ***Wells v. Fell*, 231 Ariz. 525, 297 P.3d 931 (Ct. App. 2013).**
- Defendant Wells petitioned for Special Action relief from trial judge's order that he disclose to prosecutor statements from his attorney's interviews with the state's witnesses– which he claimed to intend to use for impeachment purposes only.
- There is no exception for impeachment type evidence in either rules of crim or civil procedure!

Disclosure by Defendant

- In the civil context, Rule 26.1 requires disclosure of such impeachments evidence by both parties– See, *Zimmerman* case(1965).
- Rule 15.2(g) requires the state to show substantial need for defense disclosure– here, the prosecutor was not present nor noticed that the defense attorney planned to interview the state's witnesses– no ability to discover the statements that the defense planned to use for impeachment.

Rule 16.1- time of making motions

***State v. Colvin*, 231 Ariz. 269, 293 P.3d 545 (Ct. App. 2013).**

The day before trial, the state filed Motion for Legal Determination of Prior DUI Convictions (re 3 California DUI's)- Colvin objected as untimely.

Ct of App finds that trial judge has discretion under Rule 16.1 to "direct" when pretrial motions are filed, and further discretion to determine when to preclude untimely motions.

No abuse of discretion here because Colvin was put on notice of the 3 California priors by the state's allegation of priors.

However, the trial judge erred in precluding the California convictions– that order was reversed.

Rule 16.6 – dismissal when charging document is insufficient as matter of law

***State v. Harris (Shilgevorkyan)*, 232 Ariz. 76, 301 P.3d 580 (Ct. App. 2013).**

Defendant charged with DUI per 28—1381(A)(3) while having a drug or its metabolite in one's body.

Defense claimed no "Hydroxy-THC" the metabolite of marijuana was found, but rather Carboxy-THC was found instead.

Justice Court granted the motion to dismiss– Superior Court affirmed finding that statute did not provide for possibility of more than one specific metabolite (??)

Rule 16.6 – dismissal
State v. Harris (Shilgevorkyan)--

- Reversed– statute not vague in prohibiting presence of a drug's metabolite within one's body while driving. Carboxy-THC is a metabolite of marijuana– end of story.

Rule 17 --Guilty pleas waive all non-jurisdictional defects (subject matter juris only)

***State v. Banda*, 232 Ariz. 582, 307 P.3d 1009 (Ct. App. 2013).**

Banda pled guilty to Sexual Conduct with a Minor & 2 cts. Att. Child Molestation.

Banda filed a PCR claiming the statute of limitations had run on one of the Att. Child Molest charges– prosecutor conceded

Trial Judge corrected the lifetime probation sentence, but denied relief on the Att. Molest charge.

Relief is denied, because despite fact that statute of limitations involves jurisdiction, it is an affirmative defense that may be waived if not timely asserted– as in this case.

Rule 17.1(e) waiver of appeal

State v. Ovante, 231 Ariz. 180, 291 P.3d 974 (2013). Ovante pled guilty to all charges and admitted 2 aggravating factors. A jury sentenced Ovante to death for the murder of Vickers, and life for the murder of another.

Waiver of appeal in Rule 17.1, Ariz. R. Crim P., does not apply to capital cases.

Regardless of any plea, the Arizona Supreme Court automatically reviews a death sentence.

Rule 17.2 & 17.6
Duty to advise Defendant

State v. Stefanovich, 232 Ariz. 154, 302 P.3d 679 (Ct. App. 2013).

Stefanovich pled guilty to Agg DUI with 2 prior Agg DUI's– sentenced to 10 years prison. He files a PCR claiming ineffective assistance of counsel.

He claims trial judge failed to expressly explain that the 10 year presumptive sentence was due to the 2 prior convictions & he was entitled to require the state to prove those priors.

However, an addendum to plea agreement contained counsel's avowal that he had explained the sentencing ranges to his client fully.

Relief is denied.

Rule 17.6
Admission of a prior Conviction

State v. Gonzales, 233 Ariz. 455, 314 P.3d 582 (Ct. App. 2013).

Dina Marie Gonzales was convicted of Shoplifting w/ 2 or more predicate offenses– she was sentenced to 8 years in prison.

At the time of sentencing, Gonzales' presentence report indicated two prior felony conviction; Gonzales attorney stated her willingness to stipulate to the priors. No 17.6 colloquy!!!

Div. One found fundamental error, but no prejudice to Gonzales because she did not object to the clear evidence of her priors in the presentence report.

Affirmed.

Rule 18.1(b) Waiver of Jury Trial

State v. Becerra, 231 Ariz. 200, 291 P.3d 994 (Ct. App. 2013).

Becerra convicted in Graham County of Agg DUI

He waived his right to a jury trial when, after an off-the-record discussion with counsel, counsel states on the record that "my client indicates he'd be willing to waive a jury." Jury trial was vacated.

Trial judge failed address the defendant personally to determine if the waiver was voluntary, knowing and intelligently made– reversed & remanded for new trial

Rule 18.5 Jury Selection

State v. Medina, 232 Ariz. 391, 306 P.3d 48 (2013).

Medina was convicted in 1995 of First Degree Murder and sentenced to death. He was granted a new sentencing trial after the court found he had been denied the effective assistance of counsel at his sentencing. He was again sentenced to death in 2009.

Medina objected to his attorney's and the prosecutor's stipulation (accepted by the judge) to release and dismiss 60 prospective jurors based upon some of their answers to a jury questionnaire.

"Decisions made during jury selection involve trial strategy…." "'Counsel acting alone may make decisions of strategy' even if those decisions involve constitutional rights" citing *State v. Levato* (1996).

Affirmed.

Rule 19.1 Motion for Mistrial

State v. Arvallo, 232 Ariz. 200, 303 P.3d 94 (Ct. App. 2013).

Arvallo convicted of First Degree Murder, Kidnapping & Armed Robbery. Convictions & sentences affirmed.

During a witness' testimony she revealed that she was initially afraid of the Defendant's family and she lied to the police. She said she knew that they had had 2 people killed. A juror sent a note to the judge indicating that this testimony was disturbing and questioned whether the defendant had access to juror names & addresses. Defendant moved for a mistrial.

Trial judge addressed the jurors & explained the confidentiality of juror's names, & to determine if they had spoken about the evidence, and could continue to be fair and impartial. Judge gave them the opportunity to retire to jury room and write any additional notes about any of these issues. None were received– KUDOS to Judge Robert Gottsfield!

Another Rule 19.1 Motion for Mistrial in State v. Arvallo

Arvallo objected to the testimony of Detective Jewell, a firearms instructor for the police department who testified that the weapon used was a semiautomatic weapon and its trigger was likely pulled four times (4 shots). Arvallo claimed lack of disclosure of the expert's testimony.

Ct finds nothing in Rule 15.1 that requires a "detailed script" of a proposed witness' testimony.

Affirmed.

Rule 19.1 Mistrial

State v. Doty, 232 Ariz. 502, 307 P.3d 69 (Ct. App. 2013).

Allan Doty was convicted of Possession of a Dangerous Drug & 2 cts. Of Poss. Of Drug Paraphernalia. During his trial an officer of the Cottonwood Police Department was asked what he remembered of the Defendant's arrest; he replied that "Officer Scott ...had placed him under arrest for a warrant...."

Objection and motion for mistrial followed.

Motion was denied, trial judge instructed the jury that answer was stricken and they should not consider it.

Doty Mistrial motion

When a witness unexpectedly volunteers inadmissible testimony/evidence, "the remedy rests largely within the discretion of the trial court."

Trial judge should consider:

1. Whether the remark called attention to matters jurors would not be justified in considering in reaching their verdict, and
2. The probability that the jurors were influenced by the remarks.

Denial of mistrial is affirmed.

More Rule 19.1 mistrial issues

State v. Almaguer, 232 Ariz. 502, 303 P.3d 84 (Ct. App. 2013).

Almaguer was convicted of manslaughter in Pima County. On cross-examination of the victim's girlfriend Jolene, she was asked about her pretty strong feelings against the defendant, and she replied, "He goes on the run because he knows what he did. And from what I heard, it wasn't the first time." !!!!

Clear implication is that she knows Almaguer has killed before. Clearly inadmissible under Rule 404(b), Ariz. R. Evid.

Trial judge instructed jury to disregard that evidence.

Ct. App. Explains that it will not reverse absent evidence of a reasonable probability that the verdict would have been different had the evidence not been presented. Here, "abundant evidence of guilt"

Affirmed.

Rule 20 Motion for Judgment of Acquittal

State v. Gray, 231 Ariz. 374, 295 P.3d 951 (Ct. App. 2013).

Pima County Sheriffs Deputy Ben Hill and his canine partner "Randy" investigated a break-in at a large moving and storage facility. Randy bit Defendant Gray, who was hiding inside a large crate. Hill testified that the first person arrested was Gray whom he identified in court. However, he pointed to co-defendant Wesley Wallace!

Gray Motion for Judgment of Acquittal

Unfortunately, defense counsel had admitted in his opening statement that Gray was in the building with Wallace.

"[A]dmissions made by counsel in opening statements are generally binding on a party, may be considered by the jury, and obviate 'the necessity of fuller proof.'"

Such an admission is "substantial evidence"

Rule 20 motion was properly denied.

Rule 24.1(b) Motion for New Trial

State v. Fitzgerald, 232 Ariz. 208, 303 P.3d 519 (2013)(already discussed in regard to issue of waiver of defendant's right to be present—Fitzgerald waived his presence after his disruptive behavior caused a mistrial).

Another issue is whether Fitzgerald timely filed his Motion for New Trial nearly 3 ½ months after guilty + aggravating circumstances findings. Rule 24.1(b) requires motions for New Trial to be filed within 10 days of a verdict. Fitzgerald argues this refers to the "death verdict" in a capital case where there are multiple verdicts.

Fitzgerald, continued

Supreme Court acknowledges 3 types of verdicts in a capital case:

1. General verdict of "guilty" or "not guilty,"
2. An aggravation verdict, and
3. A capital or "death" verdict.

Court holds that Rule 24.1(b) requires the timely filing of any Motion for New Trial within 10 days after each separate verdict.

RULE 30

APPEALS FROM NON-RECORD COURTS

Record of the proceedings; trials de novo

Whillock v. Bee, 232 Ariz. 139, 302 P.3d 664 (Ct. App. 2013).

Patrick Whillock filed a timely notice of appeal following his conviction in the Pima County Consolidated Justice Court for animal cruelty. He then filed a request for a trial de novo per Rule 7(g), Ariz. Super. Ct. R. App. P. –Crim., claiming the record was insufficient.

Superior Court denied the motion for trial de novo finding sufficient audio recording of the proceedings. Whillock then requested additional time to file his appellate memorandum– which was denied.

Error, because procedural motions such as motion for trial de novo suspend time for filing of the appellate memoranda.

Remanded with instructions to reconsider request for additional time to file memorandum.

Record on Appeal-audio recording or transcript???

Stout v. Taylor, 232 Ariz. 275, 311 P.3d 1088 (Ct. App. 2013).

Stout appeals from the Superior Court order denying special action relief wherein he requested that the Justice Court prepare transcripts of his guilty plea and sentence (for reckless burning)– that request was denied because recordings were provided to him per Rule 7(c), Ariz. Super. Ct. R. App. P. –Crim.

However, Rule 32.4(d) Ariz. R. Crim. P., requires a written transcript. Remanded.

Citations to the record in appellate memoranda

Jordan v. McClennen, 232 Ariz. 572, 307 P.3d 999 (Ct. App. 2013).

Jordan was charged and convicted of 2 DUI violations in justice court and he appealed, filing an audio recording of the proceedings as permitted by local rule. In his memo, Jordan recounted testimony at the hearing on his motion to suppress, but failed to provide any citations to the record on appeal. Superior Court found that he had failed to "properly present his issues for appeal" in violation of Rule 8(a)(3), Ariz. Super. Ct. R. App. P. –Crim.

Jordan v. McClennen

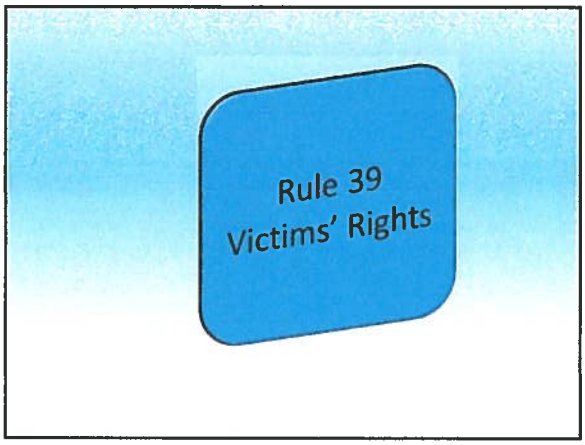
Ct. of Appeals agreed, finding that the rule requires counsel to cite to that portion of the record at which the evidence may be found by some reasonable & understandable fashion

Examples: a time-stamp, counter number, tape number and cue, etc.

Remanded to allow resubmission of Jordan's memorandum with citations.

Amendment to Rule 32.4, effective 1/1/14

The time to file petition raising claims in capital cases is extended from 120 days to 12 months from date of notice.



Victims' date of birth is protected information

***State ex rel. Montgomery v. Welty (Koontz)*, 233 Ariz. 8, 308 P.3d 1159 (Ct. App. 2013), *vacated as to Real Party In Interest Gill only*, ___Ariz.___, slip opinion filed 3/26/14.**

In several special action cases consolidated, the Court of Appeals holds that Rule 39(b) includes protection of a victim's date of birth– and that information is protected. Respondent defendants had requested the information to run 'conflict of interest checks' within their offices on the victims.

Supreme Court grants review and vacates Court of Appeals' opinion, and holds that a prosecutor may not redact discovery materials (such as a police report) --without permission of the court --to withhold victim birth dates.

Court of Appeals: Victims' d.o.b. is protected information- reasoning

A date of birth is private information, akin to a social security number
Court notes that with a name and birth date, you can discover:

1. Arrest record (may not incl. dispositions);
2. Driving record;
3. State of origin;
4. Political party affiliation;
5. Social security number;
6. Current and past addresses;
7. Civil litigation records;
8. Liens;
9. Property owned;
10. Credit history;
11. Financial accounts;
12. Possible medical and military histories

Supreme Court vacates opinion

Supreme Court disagrees and states:

"Disclosure of a victim's birth date does not, in itself, reveal a victim's locating or contact information. And, the record does not establish how easily such information may be obtained from the combination of a birth date and information that is publicly available, e.g., on the Internet."

Slip Opinion, at 7.

More on victims' birth dates…

- A prosecutor may apply for an order denying or limiting disclosures under Rule 15.5(a) where there is a risk of harassment or other harm (doesn't this apply to the *identity* of a witness?).
- Where the disclosure requirements of statutes or rules should be amended to better protect victims (such as because of the advancement of technology), those requirements would be better addressed through rule changes or statutory amendments.